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ALEXANDER L. STEVAS,
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in the

Supreme Court

of the

United States

October Term, 1984

No. 84-

DOUGLAS CHARLES DuFRESNE,

Petitioner,

vs.

BENJAMIN BAER, Chairman, United States Parole Commission, et al.

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

APPENDIX

ALLEN R. SMITH, ESQ
Post Office Box 1032
190 Avenue A, N.W.
Winter Haven, Florida 33882
(813) 299-1219
Attorney for Petitioner

40pp

INDEX TO APPENDIX

Page

Order of the Magistrate of the United States District Court for the Northern District of Florida, dated February 24, 1982 ..... App. 1

Order and Memorandum Decision of the Judge of the United States District Court for the Northern District of Florida, dated August 4, 1982 ..... App. 7-8

Order and Judgment of the Magistrate of the United States District Court for the Northern District of Florida, dated August 9, 1982 .. App. 18-19

DuFresne v. Baer, 744 F.2d 1543 (11th Cir. 1984) ..... App. 20

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

DOUGLAS CHARLES DuFRESNE,

Petitioner,

vs. PCA 81-0541

CECIL C. McCALL, Chairman
United States Parole Commission,
et al.,

Respondents.

ORDER

On January 18, 1982, this habeas corpus matter was remanded to the United States Parole Commission to more specifically inquire into, and ascertain, the monetary amounts involved in the petitioner's offense. The Parole Commission was to apply these findings to its 1977 parole guidelines to determine whether the petitioner's offense behavior severity should be classified as "Very High" or "Greatest" under those regulations. Based on the additional information furnished by the Parole Commission, the merits of the petitioner's *ex post facto* claim would then be, and are now, decided by the court.

I. RESPONDENTS' INITIAL REPORT

In their initial report to the court (document 17), the respondents inexplicably notified the court for the first time of action taken in the petitioner's case by the Parole Commission on September 25, 1981, one day after the respondents filed their response to the court's show cause order of August 27, 1981 (document 2). Evidently

prompted by the filing of the petition for writ of habeas corpus, the Parole Commission completed another review of the petitioner's offense behavior severity rating and issued a notice action clarifying its basis for the earlier decision to rate the offense as "Greatest I": "Your offense behavior has been rated as Greatest I severity because it involved the equivalent of 260 grams of pure heroin with mangerial interest." Respondents' Exhibit L.

Utilizing chemical analysis information from a laboratory report prepared for the prosecution of the petitioner's case as well as for his codefendents' cases, the Parole Commission determination of 260 grams of heroin, more correctly characterized as morphine, was reached by multiplying the net weight of opium involved, 3,663 grams, by the percentage of pure morphine found contained in the opium, 7.1 percent. Respondents' Exhibit M. The respondents posited in their first report to the court that this 260 gram figure not only results in a "Greatest I" severity rating under the 1980 parole guidelines, but also a "Greatest" severity rating under the 1977 parole guidelines, and therefore no *ex post facto* violation exists. To arrive at this result, the respondents used their "Street Value Chart," which is applied to rate various drug offenses under the 1980 parole guidelines when quantity/purity information is unavailable.

The respondents' apparent reasoning is predicated upon an analysis using the "Street Value Chart" as follows: the 3,663 grams of opium contained 260 grams of pure morphine; under the 1980 parole guidelines, 28 C.F.R. § 2.20 (1980), an offense involving more than 50 grams of pure herion (morphine) is rated as "Greatest I" severity; the corresponding "street value" for opiates in the "Greatest I" severity as found in the "Street Value Chart" is more than $100,000; therefore, the street value of 260 grams is *presumed* to be more than $100,000, which under the monetary amount standards of the 1977 parole

guidelines would place the petitioner's offense in the "Greatest" severity category. The respondents' most recent report to the court indicates that they have now abandoned, and properly so, using "presumed" street values derived from the 1980 parole guidelines to enable entrance into the 1977 parole guidelines at an equivalent severity rating.

The only significant information gleaned from the respondents' report is that the specific amount of opium involved in the petitioner's case is 3,663 grams, vice the court's previous conversion of the estimated eight (8) pounds involved to 3,628.72 grams.

II. RESPONDENTS' FINAL REPORTS AND REDETERMINATION

When the court remanded this case to the Parole Commission, the main concern requiring clarification was the monetary amount involved in the offense of conspiracy to import cocaine, the charge for which the petitioner was convicted. The court's previous order noted that ambiguous information in the record, if substantiated, could result in a monetary amount in excess of $100,000, rendering the petitioner's *ex post facto* claim unmeritorious. However, it is evident from the respondents' reports, which offer no new or additional evidence, that the $35,000 figure attributable to the cocaine offense in the original record is the only ascertainable and substantiated monetary amount involved in the cocaine case.

Because of the conjectual manner in which the Parole Commission arrived at its final assessment of the monetary amount involved in the opium aspect of this case, the court must conclude that this action was arbitrary and unauthorized, constituting an abuse of discretion and requiring reversal. As the court's previous

order exhaustively set out, the record sufficiently established several methods through which the value of the opium could be computed by the Parole Commission. The court noted that the method which produces the maximum value for the opium results in a value of $34,865.07. Nevertheless, the Parole Commission has "converted" the 3,663 grams of opium which the petitioner imported and possessed into 260 grams of pure heroin, and then has theoretically diluted that heroin to 164 ounces of 6.75 percent heroin having a purchase value of $114,800.00. Using this extrapolated value, the Parole Commission has determined that under the 1977 parole guidelines the petitioner's offense behavior severity would be "Greatest" severity, resulting the respondents assert in no *ex post facto* violation.

Because of the speculative nature of this attempt by the Parole Commission to obtain the same final decision upon remand as they did originally, the court must conclude that the respondents' actions are arbitrary, especially in light of previously available substantial information as to the value of the opium itself and in the absence of evidence to rebut those valuations.

As previously noted, the amount of opium seized from the petitioner's codefendants Smith and Ferguson was 3,663 grams. The court's previous order noted:

> The amount of opium in Smith's case was 2,500.73 which converts to 5.51 pounds. The value of Smith's opium is set at a total value of $22,500.00, which computes to a cost per gram of $9.00 and a cost per pound of $4,083.48.

Dufresne v. McCall, No. PCA 81-0541 at 11 (N.D. Fla. Jan. 18, 1982) *(Dufresne I)*. This valuation, as compared to the other computation methods discussed in the previous order, results in the highest value for the opium and

significantly was obtained from the Parole Commission's notice of action in Smith's case. Smith had obtained the amount of opium assessed to him from the petitioner.

At $9.00 per gram, 3,663 grams of opium is worth $32,967.00. The monetary amount involved, then, in the petitioner's case is as follows:

Opium purchase	$ 2,177.23
Opium value	32,967.00
Cocaine conspiracy	35,000.00
TOTAL VALUE	$ 70,144.23

Thus, under the 1977 parole guidelines, the petitioner's severity rating is "Very High" with a range of time to be served of 26 to 36 months. The respondents' setting of the petitioner's parole release date, therefore, violates the *Ex Post Facto* Clause, and this case shall again be remanded to the respondents to correct this constitutional error.

Upon remand, the respondents shall exercise their discretion in establishing the petitioner's parole release date pursuant to the 1977 parole guidelines, using the 26 to 36 month range of time to be served for persons with a severity rating of "Very High" and a salient factor score of eleven (11), while at the same time considering such mitigating and aggravating circumstances predicated upon a rational basis as supported in the record. *See* 28 C.F.R. §§ 2.18, 2.19, 2.20(c) (1977 and 1980). As noted in the court's previous order, however, multiple offense aggravation at this stage would be inappropriate. *Dufrense I* at 13.

Acordingly, it is now

ORDERED:

1. The writ of habeas corpus should be, and the same is hereby, issued, and this case is remanded one final time to the United States Parole Commission.

2. The respondents shall have fourteen (14) days from the date hereof in which to exercise their discretion and, consistent with this order, establish the petitioner's parole release date pursuant to the 1977 parole guidelines. The respondents shall, within the same period, also file notice to the court specifying the Parole Commission's final decision and rationale.

DONE AND ORDERED in Chambers at Pensacola, Florida, this 24th day of February, 1982.

ROBERT L. CRONGEYER, JR.
United States Magistrate

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

DOUGLAS CHARLES DuFRESNE,

Petitioner-Appellee,

vs. PCA 81-0541

CECIL C. McCALL, Chairman
United States Parole Commission,
et al.,

Respondents-Appellants.

_____ /

ORDER

Pursuant to and in accordance with memorandum decision of this date, it is

ORDERED as follows:

1. The magistrate's orders appealed from in this case are reversed.

2. This case is remanded to the magistrate with directions to enter an order dismissing with prejudice petitioner's application for writ of habeas corpus.

DONE AND ORDERED this 4th day of August, 1982.

_____
WINSTON E. ARNOW, Senior Judge

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA PENSACOLA DIVISION

DOUGLAS CHARLES DuFRESNE,

Petitioner-Appellee,

vs. PCA 81-0541

CECIL C. McCALL, Chairman
United States Parole Commission,
et al.,

Respondents-Appellants.
_____ /

MEMORANDUM DECISION

Before this court is an appeal by respondents from orders entered by the magistrate. The magistrate had before him, on a petition for writ of habeas corpus, a contention by petitioner that the respondents improperly and unlawfully established the petitioner's parole release date by erroneously applying parole release criteria enumerated in the United States Parole and Probation Commission Regulations 28 C.F.R. Part 2, promulgated May 1979 and amended in January 1980. Upon filing of notice of consent by the respective parties, the matter was referred to the magistrate for the conduct of all proceedings.

The magistrate concluded the respondents were in error in applying guidelines that became effective subsequent to the commission of the offenses for which petitioner was convicted and subsequent to his sentence. Under the magistrate's reasoning the guidelines have the force and effect of law and are subject to ex post facto

prohibition contained in the constitution because, under them, a prisoner's parole eligibility could be substantially diminished or eliminated by use of the parole release criteria or guidelines.

In support of this conclusion the magistrate cited *Weaver v. Graham*, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed. 2d 17 (1981) and *Graham v. United States Parole Commission*, 629 F.2d 1040 (5th Cir. 1980). He also cited *United States v. Ferri*, 652 F.2d 325, 327 (3rd Cir. 1981), saying that in it the third circuit summarized the ex post facto analysis enunciated in *Weaver* and found applicability of the ex post facto prohibition to the parole guidelines of the United States Parole Commission.

Weaver involved a Florida statute that reduced the gain time for good conduct of a prisoner. The court held the statute on its face reduces the number of monthly gain time credits available to an inmate who abided by the rules and adequately performed his tasks. The court concluded that such was unconstitutional as an ex post facto law as applied to a person whose crime was committed before the statutes enactment.

The instant case involves no such statute or regulation mandating disadvantage. Involved instead are guidelines for the exercise of the discretion by the commission - discretion it had when petitioner's crime was committed and he was sentenced and discretion it had both before and after the adoption of the guidelines here involved.

Nor in *Graham* were these sentencing guidelines involved. In that case, under the regulation in effect at Graham's sentencing, the commission was free to act respecting parole in the absence of clearly exceptional circumstances. Under regulation adopted after sentencing a presumptive parole release date could not be

advanced "except under clearly exceptional circumstances". The court concluded that, depending upon what meaning the commission imparted to the term "clearly exceptional circumstances", the regulation might significantly restrict a prisoner's parole eligibility. It remanded to the district court for it to make determination in that respect. Again, there is not involved here a regulation or guideline that, as interpreted by the commission, might mandate disadvantage. There are involved here only sentencing guidelines in which the commission has and retains discretion.

From *Stroud v. United States Parole Commission,* 668 F.2d 843 (5th Cir. 1982), at page 847:

> Nor do we find a violation of *ex post facto* prohibitions by the Commission's use of convictions occurring prior to 1976, the date the parole guidelines became effective. There is no *ex post facto* violation in the retroactive application of the guidelines. *See Graham v. U.S Parole Commission,* 629 F.2d 1040, 1043 (5th Cir. 1980). Under both the statute and regulations, the Commission may consider a prisoner's prior criminal record and may determine that the prisoner serve a sentence above those in the guidelines. 18 U.S.C. §4206, 18 U.S.C. §4207; 28 C.F.R. §2.19; 28 C.F.R. §2.20.

In *Ferri,* a prisoner contended, among other things that the application of guidelines adopted after his sentencing violated the ex post facto clause. The circuit court affirmed the district court's dismissal of the petition; Matthews filed petition for certiorari with the Supreme Court. The Supreme Court vacated the circuit court's affirmance and remanded for further consideration in the light of *Weaver.*

The petitioner relied on *Geraghty v. U.S. Parole Commission*, 579 F.2d 238 (3rd Cir. 1978). The *Ferri* 3rd Circuit Court felt the reasoning in *Weaver* strengthened the views expressed in the earlier case of *Geraghty*. It had there concluded that the net effect of the guidelines, if mechanically applied, might have ex post facto effect, and remanded to the district court for determination whether the commission in fact exercised discretion in applying the new guidelines. In *Ferri*, the case was remanded to the district court for consideration of the ex post facto contentions presented in the light of *Weaver* and *Geraghty*.

In what is to this court somewhat curious reasoning, the *Geraghty* court said that since the commission departed from the guidelines only in something like 8.7% of the cases, the guidelines were in actuality an "unyielding conduit".

Obviously, the guidelines were not an "unyielding conduit" in those cases where the commission went beyond them. The petitioner in *Stroud* also presented a mechanical contention.The court gave it short shrift. It agreed with the magistrate that petitioner's own case exemplified that the procedure was not purely mechanical because, in his case, a decision outside the guidelines had been made.

It appears the vast majority, though not all, of the commission's parole decisions fall within the guidelines. The promotion of consistency was one of the purposes of their adoption; it is understandable that the majority of the decisions fall within the guidelines. It still remains that the guidelines themselves are not mechanically applied, as *Stroud* points out, because the commission in some cases does indeed go beyond them.

In *Warren v. U.S. Parole Commission*, 659 F.2d 183

(D.C. Cir. 1981) there was involved the question of violation of the ex post facto requirements by subsequently adopted guidelines for reparole.

The court, saying that "guidelines for reparole, like the guidelines for parole, however, are just that - guidelines", held that the existence of the guidelines does not increase the prisoner's punishment. As it pointed out, the parole commission may choose not to follow the guidelines or do other things within its discretion. Because of such, it cannot be said that the guidelines themselves disadvantage a prisoner. The decision pointed out that a change merely in the manner in which the commission exercises its discretion cannot offend the ex post facto clause and it went ahead to point out that:

> The mere fact that the Parole Commission's mercy is now channeled, structured and rationalized by a formal system of guidelines does not worsen Warren's position. He was sentenced to be held at their discretion. He is being held at their discretion. Such are the wages of crime.
> 659 F.2d at 196.

The court, accordingly, held that the application of the parole commission's reparole guidelines to *Warren* does not offend the ex post facto clause of the constitution. It noted that it is joined in that conclusion by all circuits that have considered the question save one. It cited cases in the second, sixth, seventh and ninth circuits that agree with that. It pointed out that in *Geraghty* the third circuit ruled otherwise.

Warren, in referring to second, sixth, seventh and ninth circuits as rejecting similar claims, cited the following cases:

Shepard v. Taylor, 556 F.2d 648 (2d Cir. 1977) (dictum):

Ruip v. United States, 555 F.2d 1331 (6th Cir. 1977);

Zeidman v. U.S. Parole Commission, 593 F.2d 806 (7th Cir. 1979);

Rifai v. U.S. Parole Commission, 586 F.2d 695 (9th Cir. 1978).

Other cases holding that the provision against ex post facto legislation does not apply to these parole commission guidelines include *Kirby v. United States*, 463 F.Supp. 703 (1979), *Richards v. Crawford*, 437 F.Supp. 453 (1977) and *Smaldone v. United States*, 458 F.Supp. 1000 (1978).

The guidelines here involved are found in Title 28, §2.20, Code of Federal Regulations. As they existed as applied by the commission in this case, they read in pertinent part as follows:

> (a) To establish a national paroling policy, promote a more consistent exercise of discretion, and enable fairer and more equitable decision-making without removing individual case consideration, the United States Parole Commission has adopted guidelines for parole release consideration.
>
> (b) These guidelines indicate the customary range of time to be served before release for various combinations of offense (severity) and offender (parole prognosis) characteristics. The time ranges specified by the guidelines are established specifically for cases with good

institutional adjustment and program progress.

(c) These time ranges are merely guidelines. Where the circumstances warrant, decisions outside of the guidelines (either above or below) may be rendered.

(d) The guidelines contain examples of offense behaviors for each severity level. However, especially mitigating or aggravating circumstances in a particular case may justify a decision or a severity rating different from that listed.

(e) An evaluation sheet containing a "salient factor score" serves as an aid in determining the parole prognosis (potential risk of parole violation). However, where circumstances warrant, clinical evaluation of risk may override this predictive aid.

20 C.F.R. §2.20 (1979 and 1980).

As is apparent from them, they were adopted to establish a national paroling policy, promote a more consistent exercise of discretion and enable thorough and more equitable decision making without removing individual case consideration. The guidelines point out the time ranges are merely guidelines and that decisions outside of them may be rendered when circumstances warrant.

As this court understands it, the reasoning of those cases denying ex post facto application of these guidelines rests in the fact that both under the statute authorizing their adoption, and under them, they are indeed guidelines - nothing more and nothing less. The commission may deviate from them and it is not bound

by them. Under them the commission has the discretionary right to make parole decisions outside them and it does so.

In *Portley v. Grossman,* 444 U.S. 1311, 62 L.Ed. 2d 723, 100 S.Ct. 714 (1980), (in chambers opinion of Justice Rehnquist) the opinion stated the reparole consideration guidelines, 28 C.R.F. §2.21 (1978) operated only to provide a frame work for the commission's exercise of its statutory discretion. Citing *Dobbert v. Florida*, 432 U.S. 282, 53 L.Ed. 2d 344, 97 S.Ct. 2290 (1977) Justice Rehnquist concluded the change in the guidelines assisting the commission in the exercise of its discretion is in the nature of a procedural change found permissible in *Dobbert.*

Under that reasoning, the guidelines here involved present a permissible procedural change. The petitioner cannot be held in confinement beyond the sentence imposed on him and at the time of his sentence release on parole earlier than its expiration date was in the commission's discretion. Like the reparole guidelines, these guidelines neither deprive petitioner of any pre-existing right nor enhance the sentence imposed.

The court disagrees with the magistrate's conclusion that, since a prisoner's parole eligibility could be substantially diminished or eliminated by the use of parole criteria or guidelines, such presents ex post facto problems. To this court, a law or regulation having the force of law does not have ex post facto effect unless it would - not could - disadvantage the offender affected by it.

As the commission points out, Congress intended that the commission should constantly monitor and revise its guidelines when appropriate. To hold that every time it does so it runs the risk of ex post facto violation, in

the exercise of the discretion vested in it by the Congress, strains beyond reason the ex post facto requirement of the constitution. The congress intended to vest discretion in the commission, and, having that discretion, its guidelines cannot have ex post facto effect.

On appeal the question is also raised whether the magistrate erred in finding the commission acted arbitrarily and capriciously in relying on hearsay information to render the same release decision in response to his January 18, 1982 order. The matter was remanded by the magistrate to the U.S. Parole Commission to inquire more specifically into and ascertain the monetary amounts involved in the petitioner's offense. If there was a monetary amount in excess of $100,000 then the petitioner's ex post facto claim in this case would be unmeritorius.

In apparent response the commission presented before the magistrate affidavit of its agent supporting the conclusion that the opium involved was worth more than $100,000.

In the affidavit street values were used, which made its value much more than the values that had been previously assigned to it by the commission.

The magistrate, pointing out such constituted a departure from the first valuation method used, and saying that the manner in which it arrived at its final assessment was "conjectural", concluded that this was arbitrary unauthorized action constituting an abuse of discretion ad requiring reversal.

The magistrate erred in so holding. The commission had the right, under the law, to use hearsay information and had the right, under the law, to proceed on the street value evaluation for value purposes and it had the right

to proceed by affidavit as it did.

That such changed method of evaluation apparently came in response to the magistrate's ruling and in an endeavor to place beyond question the ex post facto problem does not establish that the action of the commission, which it was authorized to take, and which it took in an authorized manner, was arbitrary. To so hold fails to accord, as the commission points out, the deference that is due the commission and its finding.

On its review, this court concludes that the magistrate made reversible error in finding that the parole commission's retrospective application of its parole guidelines to petitioner's case violated the constitutional ban against ex post facto laws.

This court also concludes that the magistrate erred in finding the commission acted arbitrarily and capriciously to render its valued decision in response to his January 18, 1982 order.

Order will be entered reversing the magistrate's orders appealed from in this case with the case being remanded to the magistrate with directions to enter an order dismissing with prejudice petitioner's application for writ of habeas corpus.

DATED this 4 day of August, 1982.

WINSTON E. ARNOW, Senior Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

DOUGLAS CHARLES DuFRESNE,

Petitioner,

vs. PCA 81-0541

CECIL C. McCALL, Chairman,
United States Parole
Commission, et al.,

Respondents.

_____ /

ORDER

This cause is before the court upon remand by the District Court directing entry of an order dismissing with prejudice petitioner's application for writ of habeas corpus. Accordingly, it is now

ORDERED:

1. The petition for habeas corpus is hereby denied.

2. The clerk of the court shall enter a judgment against petitioner on the merits and with prejudice.

DONE AND ORDERED in Chambers at Pensacola, Florida, this 9th day of August, 1982.

ROBERT L. CRONGEYER, JR.
United States Magistrate

UNITED STATE DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

DOUGLAS CHARLES DuFRESNE,

Petitioner,

vs. PCA 81-0541

CECIL C. McCALL, Chairman,
United States Parole
Commission, et al.,

Respondent(s).

J U D G M E N T

Pursuant to and at the direction of the Court,

It is Ordered and Adjudged that the petitioner take nothing and that this petition be dismissed with prejudice/denied on the merits.

Dated at Pensacola, Florida, this 9th day of August, 1982.

MARVIN S. WAITS, CLERK

By: _____
Deputy Clerk

Douglas Charles DUFRESNE,
Petitioner-Appellant,

v.

Benjamin BAER, Chairman, U.S. Parole Commission, Et Al.,
Respondents-Appellees.

No. 82-5942.

United States Court of Appeals,
Eleventh Circuit.

Oct. 29, 1984.

Federal prisoner, who pled guilty to conspiracy to import cocaine, commenced habeas corpus proceedings, alleging that the United States Parole Commission fixed his presumptive parole release date using guidelines that violated the ex post facto clause of the Federal Constitution. The United States District Court for the Northern District of Florida, Winston E. Arnow, J., denied the relief, and prisoner appealed. The Court of Appeals, Tjoflat, Circuit Judge, held that retrospective amendment of the federal parole guidelines upgrading the severity rating for conspiracy to import cocaine did not violate the ex post facto clause, since such amendment did not increase prisoner's punishment, and such guidelines did not have the force and effect of law.

Affirmed.

1. Constitutional Law ⇐ 199

An "ex post facto law" possesses three characteristics: it is a criminal or penal measure,

retrospective, and disadvantageous to the offender because it may impose greater punishment. U.S.C.A. Const. Art. 1, § 9, cl. 3.

See publication Words and Phrases for other judicial constructions and definitions.

2. Constitutional Law ⇐ 203

A law which is merely procedural and does not add to the quantum of punishment cannot violate the ex post facto clause even if it is applied retrospectively. U.S.C.A. Const., Art. 1, § 9, cl. 3.

3. Constitutional Law ⇐ 197

When subjecting a law to ex post facto scrutiny, courts should bear in mind the related aims of the ex post facto clause: providing fair notice of which acts will subject the perpetrator to criminal sanctions, and preventing vindictive criminal legislation. U.S.C.A. Const. Art. 1, § 9, cl. 3.

4. Constitutional Law ⇐ 197

The ex post facto clause operates to ensure that a citizen's fair notice as to what acts are criminal will not be changed after the citizen acts in reliance on that notice. U.S.C.A. Const. Art. 1, § 9, cl. 3.

5. Pardon and Parole ⇐ 42

Congress, in the Parole Commission and Reorganization Act, intended that the Parole Commission continue to refine both the criteria which are used in parole decision making and the means for obtaining the information used. 18 U.S.C.A. § 4202 et seq.

6. Constitutional Law ⇐ 203

Retrospective amendment of parole guidelines by the Federal Parole Commission, upgrading the severity rating for conspiracy to import cocaine, did not increase defendant's punishment and, thus, did not violate the ex post facto clause of the Federal Constitution. 18 U.S.C.A. §§ 4202 et seq., 4203(a)(1); U.S.C.A. Const. Art. 1, § 9, cl. 3.

7. Constitutional Law ⇐ 203

Parole guidelines of the Federal Parole Commission do not have the force and effect of law; thus, retrospective amendment of such guidelines by the Commission does not violate the ex post facto clause of the Federal Constitution. 18 U.S.C.A. §§ 4202 et seq., 4203(a)(1); U.S.C.A. Const. Art 1, § 9, cl. 3.

8. Pardon and Parole ⇐ 42, 53

Congress, in the Parole Commission and Reorganization Act, intended that the Parole Commission periodically amend the parole guidelines to reflect contemporary views concerning the seriousness of given crimes and parole recidivism. 18 U.S.C.A. §§ 4202 et seq., 4203(a)(1).

9. Pardon and Parole ⇐ 48

The standards for release on parole in the Parole Commission and Reorganization Act are not changed from prior law. 18 U.S.C.A. §§ 4202 et seq., 4206(a).

10. Pardon and Parole ⇐ 47, 53

The Federal Parole Commission may follow its parole guidelines, disregard them, or change them; parole remains an act of discretion. 18 U.S.C.A. §§ 4202 et

seq., 4203(a)(1), 4206(a).

Appeal from the United States District Court for the Northern District of Florida.

Before TJOFLAT and HILL, Circuit Judges, and SIMPSON, Senior Circuit Judge.

TJOFLAT, Circuit Judge:

In these habeas corpus proceeding, the petitioner, a federal prisoner, alleges that the U.S. Parole Commission fixed his presumptive parole release date using guidelines that violated the ex post facto clause of article 1, section 9, of the Constitution. The district court denied relief. We affirm.

I.

The petitioner, Douglas Dufresne, was a senior pilot for Pan American Airlines. During the late 1970's he began trafficking in illicit drugs, at one point importing eight pounds of raw opium into the United States from Iran. In 1979 a federal grand jury in the Western District of Texas indicted petitioner in three counts for conspiracy to import opium, possession with intent to distribute opium, and conspiracy to import cocaine. The indictment alleged that petitioner committed these acts during the period from March 1978 to March 1979.

On September 17, 1979, petitioner pled guilty to the third count of the indictment,[1] conspiracy to import cocaine, and the district court sentenced him to a partially indeterminate eight-year prison sentence under

[1] On the government's motion, the court dismissed the first two counts of the indictment. *See* Fed.R.Crim.P. 48(a).

18 U.S.C. § 4205(a) (1982).[2] Under this sentence, petitioner would become eligible for parole at the discretion of the U.S. Parole Commission (the Commission) after serving one-third of this eight-year term. *Id.* On January 14, 1980, the court granted petitioner's Fed.R.Crim.P. 35 motion to modify sentence and made petitioner's sentence fully indeterminate under 18 U.S.C. § 4205(b)(2) (1982).[3] Petitioner thus became eligible for parole at any time, at the Commission's discretion.

The Commission, acting through the Commissioner in charge of the Southeast Region (regional Commissioner),[4] initially considered petitioner for parole four months later, in May. Following the recommendation of the two examiners who conducted

[2] 18 U.S.C. § 4205(a) (1982) provides in pertinent part:
Whenever confined and serving a definite term or terms of more than one year, a prisoner shall be eligible for release on parole after serving one-third of such term or terms or after serving ten years of a life sentence or of a sentence of over thirty years ....

[3] 18 U.S.C. § 4205(b)(2) (1982) provides in pertinent part:
Upon entering a judgment of conviction, the court having jurisdiction to impose sentence, when in its opinion the ends of justice and best interest of the public require that the defendant be sentenced to imprisonment for a term exceeding one year, may ... fix the maximum sentence of imprisonment to be served in which event the court may specify that the prisoner may be released on parole at such time as the Commission may determine.

[4] The nine-member U.S. Parole Commission has been structured as follows at all times relevant here: five members in addition to performing the duties assigned to the full Commission, e.g., promulgating guidelines, serve as regional Commissioners and make most of the initial parole decisions; three members, also in addition to performing the duties assigned to the full Commission, serve as the National Appeals Board which, *inter alia*, reviews the parole decisions of the regional Commissioners. *See generally*, 18 U.S.C. §§ 4202, 4203(c)(l), (4), 4204(a)(5) (1982).

petitioner's parole hearing and applying the Commission's parole guidelines, 28 C.F.R. § 2.20 (1979), the regional Commissioner gave petitioner a presumptive parole release date of fifty-two months. This meant that petitioner would be paroled in fifty-two months if he "substantially observed the rules of the institution" in which he was confined, *see* 18 U.S.C. § 4206(a) (1982); if he did not, the Commission could require him to serve more of his eight-year sentence.

In setting petitioner's presumptive release date, the regional Commissioner applied guidelines which focused upon the severity of the petitioner's offense and his parole prognosis. These parole guidelines classified the severity of his offense as "Greatest I," a severity rating surpassed only by the "Greatest II" rating given to crimes such as murder and piracy. The severity rating was high because at the time petitioner committed his crime he possessed a managerial interest in more than fifty grams of 100% pure opiate.[5] The guidelines gave petitioner a "very good" parole prognosis because his perfect eleven "salient factor score," calculated by weighing offender characteristics such as a history of criminal convictions, previous incarceration, and drug dependency, indicated that he would pose no risk to society if released. According to the guidelines, an inmate with an offense severity rating of "Greatest I" and a salient factor score of eleven was to serve a term somewhere between forty and fifty-two months. The regional Commissioner set petitioner's term at fifty-two

[5] Although petitioner pled to and was found guilty only of conspiracy to import cocaine, his possession of eight pounds of highly pure opium formed the basis for the severity rating. *See* 28 C.F.R. § 2.19 (1979). Petitioner does not question the Commission's consideration of this possession in determining the severity rating.

months.[6]

Petitioner appealed this decision to the Commission's National Appeals Board. He contended that the regional Commissioner's decision should have been based on the offense severity rating in effect at the time he committed his crime rather than the one currently in effect. The earlier offense rating, repealed in mid-1979,[7] would have assessed the seriousness of petitioner's crime on the basis of the street value of the drugs he possessed, not on the basis of the purity of those drugs and his managerial interest therein. Thus, because his drugs had a street value of less than $100,000, petitioner's crime would have been classisfied as "Very High," not "Greatest I." A "Very High" offense rating, combined with a salient factor score of eleven, would have called for petitioner to be incarcerated for a period between twenty-six to thirty-six months.

The National Appeals Board affirmed the regional Commissioner's decision, and petitioner, having exhausted his administrative remedies, brought these habeas corpus proceedings in the district court. Petitioner sought an order requiring the Commission to give him a presumptive parole date within the time frame specified in the guidelines in effect when he committed his crime. Petitioner's sole complaint was that the Commission, in applying the current guidelines, retroactively enhanced the punishment for this crime, thereby violating the ex post facto prohibition found in article 1, section 9, clause 3, of the Constitution. The

[6] The regional Commissioner could have set petitioner's release date above or below that indicated by the guidelines, however. *See infra* slip op. at p. 524 & note 16, at p. _____ & note 16. The Commissioner later accelerated petitioner's presumptive release date by six months for reasons unimportant to this appeal. Petitioner has served approximately 40 months of his sentence and is currently released on bail pending this appeal.

[7] 44 Fed.Reg. 26540-48 (May 4, 1979).

parties consented to the trial of the case before a U.S. magistrate. *See* 28 U.S.C. § 636(c) (1982). The magistrate agreed with petitioner and granted the relief he sought. The district court, on appeal, *id.*, reversed, concluding that the parole guidelines the Commission applied in petitioner's case neither deprived him of any pre-existing right nor enhanced his sentence; rather, they merely aided the Commission in the exercise of its decision making. Petitioner took this appeal from the district court's decision.

II.

[1, 2] The ex post facto clause at issue commands that "[n]o...ex post facto law shall be passed." U.S. Const. Art. I, § 9, cl. 3.[8] An ex post facto law possesses three characteristics: it is a criminal[9] or penal measure, retrospective and disavantageous to the offender because it may impose greater punishment. *Weaver v. Graham*, 450 U.S. 24, 28-29, 101 S.Ct. 960, 964, 67 L.Ed.2d 17 (1981); *Dobbert v. Florida,* 432 U.S. 282, 292-93, 97 S.Ct. 2290, 2297-98 53 L.Ed.2d 344 (1977). *See Paschal v. Wainwright*, 738 F.2d 1173, at 1175 (11th Cir. 1984) A law which is merely procedural and does not add to the quantum of punishment, however, cannot violate the ex post facto clause even if it is applied retrospectively. *Weaver,* 450 U.S. 24, 29 n. 12, 101 S.Ct. 960, 964 n. 12, 67 L.Ed.2d 17 (1981); *see Dobbert,* 432 U.S. 282, 293, 97 S.Ct.

[8] For a brief history of the ex post facto clauses, U.S. Const. Art. I, § 10, cl. and U.S. Const. Art. 1, § 9, cl. 3, *see* J. Nowak, R. Rotunda, & J. Young, Handbook on Constitutional law 434-36 (1978); *Warren v. United States Parole Comm'n,* 659 F.2d 183, 186-89 (D.C.Cir. 1981).

[9] Some support exists for the view that the framers intended the ex post facto prohibition to apply to civil as well as criminal laws. *See* Crosskey, *The True Meaning of the Constitutional Prohibition of Ex-Post Facto Laws,* 14 U.Chi.L. Rev. 539 (1947). Modern courts have applied the ex post facto clauses solely to criminal legislation. *Warren,* 659 F.2d at 187 n. 15; *see also, Harisiades v. Shaughnessy,* 342 U.S. 580, 594-95, 72 S.Ct. 512, 521-22, 96 L.Ed. 586 (1952).

2290, 2298, 53 L.Ed.2d 344 (1977) ("[e]ven though it may work to the disadvantage of a defendant, a procedural change is not *ex post facto.*"). *See also Thompson v. Missouri,* 171 U.S. 380, 18 S.Ct. 922, 43 L.Ed. 204 (1898); *Hopt v. Utah,* 110 U.S. 574, 4 S.Ct. 202, 28 L.Ed. 262 (1884).

[3] When subjecting a law to ex post facto scrutiny, courts should bear in mind the related aims of the ex post facto clause: providing fair notice of which acts will subject the perpetrator to criminal sanctions,[10] and preventing vindictive criminal legislation.[11] We are

[10] "Critical to relief under the *Ex Post Facto* clause is not an individual's right to less punishment, but the last of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated." *Weaver,* 450 U.S. at 30; 101 S.Ct. at 965.

> In a society committed to liberty and not governed by orthodoxy the presumption must be that acts not specifically prohibited are permitted. Such a presumption guarantees that the citizenry may feel secure in acting in reliance on existing law and assures that fair notice will be given of any change.

Warren, 659 F.2d at 188.

[11] "From the onset ... the ex post facto clauses have been understood to have been principally aimed at curtailing legislative abuses." *Warren,* 659 F.2d at 187. *See* The Federalist No. 44, at 351 (J. Madison); Note, *Ex Post Facto Limitations on Legislative Power,* 73 Mich.L.Rev. 1491 (1975). Justice Chase states that the ex post facto prohibition

> very probably arose from the knowledge, that the parliament of Great Britian claimed and exercised a power to pass such laws ... The acts were legislative judgments; and an exercise of judicial power ... With very few exceptions, the advocates of such laws were stimulated by ambition, or personal resentment and vindictive malice. To prevent such and similar acts of violence and injustice, I believe, the federal and state legislatures were prohibited from passing any ... *ex post facto* law.

Calder v. Bull, 3 U.S. (3Dall.) 386, 389, 1 L.Ed. 648 (1798) (citing notorious ex post facto legislation passed by the British Parliament).

guided by these principles as we determine whether petitioner has presented an ex post facto violation.

The second characteristic of an ex post facto law is concededly present in this case; the guidelines applied retrospectively to petitioner. The first and third characteristics are not present, however; the guidelines neither worked to petitioner's detriment nor constituted a criminal or penal law.

The federal sentencing statute under which petitioner received his modified sentence, 18 U.S.C. § 4205(b)(2) (1982), was enacted as a "medical model" sentencing provision.[12] The sentencer was to utilize the fully indeterminate prison term, prescribed by the statute, primarily for the purpose of rehabilitating the defendant; the parole commission, as "doctor," would monitor the defendant's response to treatment, decide when he was cured, and then release him.[13]

In 1976, the Congress, having grown dissatisfied with this medical model sentencing scheme for several reasons, passed the Parole Commission and

[12] In addition to 18 U.S.C. § 4205(b)(2) (1982), examples of "pure" medical model federal sentencing statues include the Narcotic Addicts Act, 18 U.S.C. §§ 4251-55 (1982); The Federal Youth Corrections Act, 18 U.S.C. §§ 5005-26 (1982); and the Juvenile Delinquency Act, 18 U.S.C. §§ 5031-42 (1982). These statutes were fashioned primarily to serve the purpose of rehabilitation. 18 U.S.C. § 4205(a), (b)(1) (1982), sentences which are partially indeterminate in that they set a minimum time the offender must remain in prison before becoming eligible for parole consideration, might be said to serve the purposes of punishment and general and specific deterrence as well as that of rehabilitation.

[13] As the Supreme Court noted in *Williams v. New York*, 337 U.S. 241, 248, 69 S.Ct. 1079, 1083-84, 93 L.Ed. 1337 (1949), in commenting on the then role of the U.S. parole board, "[r]etribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence."

Reorganization Act (the Parole Act or Act).[14] The Act reconstituted the parole authority as the U.S. Parole Commission, abolished the parole authority's "doctor" role, and gave it the new role of resentencer. Henceforth, the Commission, acting on essentially the same information presented to the sentencing judge,[15] would resentence the defendant for the purposes of punishment, general deterrence and specific deterrence. Rehabilitation would not be one of the Commission's resentencing objectives; any rehabilitation an offender might obtain would be a coincidental result of his incarceration.

The parole Act instructed the Commission to carry out a "national parole policy" and to promulgate guidelines to aid it in making parole decisions. 18 U.S.C. § 4203(a)(1) (1982). Following this directive, the Commission promulgated guidelines for the announced purpose of promoting "a more consistent exercise of

[14] Act of Mar. 15, 1976, Pub.L. No. 94-233, 1976 U.S. Code Cong. & Ad.News (90 Stat.) 219 (codified in various sections of 18 U.S.C. (1976)). The primary text of the Parole Reorganization Act begins at 18 U.S.C. § 4202 (1982).

[15] In fact, the Commission acts on a range of information greater than that considered by the sentencing judge. *See United States ex rel. Goldberg v. Warden*, 622 F.2d 60, 84 (3d Cir.), *cert. denied*, 449 U.S. 871, 101 S.Ct. 210, 66 L.Ed.2d 91 (1980). The Commission may consider:

> (1) reports and recommendations which the staff of the facility in which such prisoner is confined may make;
> (2) official reports of the prisoner's prior criminal record, including a report or record of earlier probation and parole experiences;
> (3) presentence investigation reports;
> (4) recommendations regarding the prisoner's parole made at the time of sentencing by the sentencing judge; and
> (5) reports of physical, mental, or psychiatric examination of the offender (and) ... (s)uch additional relevant information concerning the prisoner ... as may be reasonably available.

18 U.S.C. § 4207 (1982).

discretion, and enabling fairer and more equitable decision-making without removing individual case consideration." 28 C.F.R. § 2.20 (1979).

The Act requires the Commission, in deciding whether to grant parole, to consider "the nature and circumstances of the [prisoner's] offense and the history and characteristics of the prisoner" and its guidelines. 18 U.S.C. § 4206(a) (1982). The Commission's guidelines speak to "the nature and circumstances of the [prisoner's] offense" by classifying it in terms of severity, and to "the history and characteristics of the prisoner" by looking to his prior criminal record, drug dependence and other "salient factors" that are presumed to indicate whether he will be a good parole risk. The Commission is bound to follow these guidelines unless there is "good cause" for not doing so. 18 U.S.C. § 4206(c) (1982).[16]

The Act cautions the Commission not to parole a prisoner if he has not "substantially observed the rules of

[16] The regulation that promulgated the guidelines, 28 C.F.R. § 2.20(c), (d), (e) (1979), indicated the breadth of the Commissioner's discretion depart therefrom with the following language:

> (c) These time ranges are merely guidelines. Where the circumstances warrant, decisions outside of the guidelines (either above or below) may be rendered.
>
> (d) The guidelines contain examples of offense behaviors ... However, especially mitigating or aggravating circumstances in a particular case may justify a decision or a severity rating different from that listed.
>
> (e) An evaluative sheet containing a "salient factor score" serves as an aid in determining the parole prognosis (potential risk of parole violation). However, where circumstances warrant, clinical evaluation of risk may override this predictive aid.

The Commission intended that the guidelines aid it in achieving a uniform system of parole, while retaining enough flexibility in the parole decision-making process to permit justice in each individual case.

the institution or institutions to which he has been confined," if his "release would ... depreciate the seriousness of his offense or promote disrespect for the law," or if his "release would ... jeopardize the public welfare." 18 U.S.C. § 4206(a) (1982). With this sentencing parole scheme in mind, we turn to the two ex post facto issues we must resolve: first, whether the Commission, in amending its guidelines to upgrade the severity rating of petitioner's offense from "Very High" to "Greatest II," increased his punishment; second, whether the guidelines are "laws."

A.

[4] The ex post facto clause operates to ensure that a citizen's fair notice as to what acts are criminal will not be changed after the citizen acts in reliance on that notice. When petitioner conspired to import cocaine into the United States he was on notice of the prison sentence he could receive if convicted, the portion of that sentence he would have to serve before he would be eligible for parole, and the extent to which his period of incarceration could be reduced through gain time. *See, e.g., Weaver v. Graham,* 450 U.S. 24, 29, 101 S.Ct. 960, 964, 67 L.Ed.2d 17 (1981). Specifically, petitioner was on notice that, if he received the eight-year fully indeterminate sentence the court imposed, the Commission would have the discretion to parole him at any time, unless it determined *at the time it considered him for parole* that his release would "depreciate the seriousness of his offense or promote disrespect for the law" or would "jeopardize public welfare." Petitioner was also on notice that, in considering him for release, the Commission had to follow its guidelines unless "good cause" indicated otherwise.

[5] Petitioner's claim that the Commission could not amend the guidelines retrospectively if the amendment

would produce a longer term of incarceration implies that he was not on notice, when he committed his crime, that such an amendment could occur. In truth, petitioner was on notice that such an amendment might well occur. The Commission had a statutory duty to monitor and periodically update its guidelines and to apply current guidelines to crimes previously committed.[17] *See, e.g.*, H.Conf.Rep. No. 838, 94th Cong.2d Sess. 25, *reprinted in* 1976 U.S. Code Cong. & Ad.News, 335, 358-59 (in determining release Commission "shall be congnizant of the public perception of and respect for the law.") In the situation before us, the Commission determined that the street value of the narcotics an offender possessed did not reflect upon the seriousness of his drug offense as much as did the purity of the narcotics and his managerial interest in them. When he committed his crime, petitioner knew that the Commission, prior to his parole hearing, might make such a judgment call and thus lengthen any period of confinement he might have to serve. Petitioner knew, or should have known, that the role he played in his smuggling operation and the purity of the drugs involved were highly relevant to two important questions the Commission would have to decide in considering him for parole: whether his release would (1) depreciate the seriousness of his offense or promote disrespect for law and (2) jeopardize the public welfare.

Six U.S. Courts of Appeals and one U.S. Supreme Court Justice have entertained claims similar to petitioner's and have held that retrospective changes in

[17] Congress intended that the "Parole Commission ... continue to refine both the criteria which are used[in parole decision making] and the means for obtaining the information used ...." H.R.Rep. No. 94-838, 94th Cong. 1st Sess. at 25-26, reprinted in 1976 U.S.Code Cong. & Ad.News 358-59. For example, "[t]he Parole Commission shall actively seek the counsel and comment of the corrections and criminal justice communications prior to promulgation of guidelines and shall be cognizant of past criticism of parole decision making." *Id.* at 359.

parole guidelines do not aggravate the punishment provided for a crime. *See Portley v. Grossman*, 444 U.S. 1311, 100 S.Ct. 714, 62 L.Ed.2d 723 (1980) (Rehnquist, J., circuit justice; motion for stay); *Warren v. United States Parole Commission*, 659 F.2d 183 (D.C.Cir. 1981), *cert. denied*, 455 U.S. 950, 102 S.Ct. 1454, 71 L.Ed.2d 665 (1982); *Hayward v. United States Parole Commission*, 659 F.2d 857 (8th Cir. 1981), *cert. denied*, 456 U.S. 935, 102 S.Ct. 1991, 72 L.Ed.2d 454 (1982); *Rifai v. United States Parole Commission*, 586 F.2d 695 (9th Cir. 1978); *Shepard v. Taylor*, 556 F.2d 648 (2d Cir.1977); *Ruip v. United States*, 555 F.2d 1331 (6th Cir. 1977).[18] In *Portley*, a re-parole cause, Justice Rehnquist sitting as a circuit justice, held that changes in parole guidelines do not add punishment retrospectively. He noted that the ex post facto clause does not extend to every change which may work to a defendant's disadvantage and does not limit changes in procedure which do not affect substantive rights. 444 U.S. at 1312, 100 S.Ct. at 715 (citing *Dobbert*, 432 U.S. at 293, 97 S.Ct. at 2298). Because of the discretion retained by the Commission, Justice Rehnquist held that the guideline amendments were merely procedural, no pre-existing right was impaired, and the offender's

[18] Petitioner contends that *Portley* and *Warren* are inapposite because they deal with reparole. The analysis of the guidelines under the ex post facto clause remains the same and the logic of those decisions extends beyond the individual factual settings. Necessary to the ultimate conclusion in each of those cases, that the promulgation or amendment of parole guidelines was not the creation of an ex post facto law, was the intermediate conclusion that the guidelines did not affect the prisoner's eligibility for parole. A repeat or reduction of parole eligibility could violate the ex post facto clause, however. *See Weaver*, 450 U.S. at 33, 101 S.Ct. at 967.

punishment was not enhanced. *Id.* at 1312-13, 100 S.Ct. at 714-15.[19]

[6] In sum, the commission's decision in this case implicated neither of the principal policies served by the ex post facto clause, to ensure that the offender is not singled out as the target of legislature retribution and that he is provided fair notice of the punishment that may be meted out if he transgresses the criminal law.

B.

[7] As the district court concluded, the Commission's guidelines are, simply, guidelines. They are not promulgated by any legislature. Rather, they are stated policy rules that show how agency discretion is likely to be exercised.[20] They do not state rules of conduct for the public. A change in the guidelines does not affect the maximum or minimum prison sentence a court may impose, the point at which the prisoner becomes eligible

[19]Petitioner claims that relief is required by *Weaver*, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981). *Weaver* dealt with an ex post facto challenge to a statute which retrospectively limited statutory prison "gain time." *Weaver* applies to this case for the principles it adds to ex post facto analysis, not for its specific holding. See our discussion of *Weaver* in a similar context, *Paschal v. Wainwright*, at 1173 (11th Cir. 1984). Petitioner also urges this court to adopt the Third Circuit's reasoning in *United States ex rel. Forman v. McCall*, 709 F.2d 852 (3d Cir. 1983) (guidelines, if applied inflexibly, could violate ex post facto clause). We have noted previously that *Forman* has been soundly rejected by federal courts which have considered the issue, *Paschal*, at 1180, n. 12, and this court has rejected it as not persuasive. *See id.* at 1180-81.

[20] We are not persuaded that the guidelines constitute "laws" under the ex post facto clause merely because they could come under the rulemaking provisions of the Administrative Procedures Act. *See, e.g., Pickus v. United States Board of Parole*, 507 F.2d 1107 (D.C.Cir.1974) (promulgation of guidelines before Parole Reorganization Act subject to Administrative Procedures Act).